In the Supreme Court of the United States

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MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1972

No. 72-274

ALLEN COHEN,

Petitioner,

vs.

RICHARD HONGISTO, Sheriff of the City and County of San Francisco, et al.,

Respondents,

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The order of the United States District Court for the Northern District of California granting a writ of habeas corpus on April 2, 1971, is Appendix B to the petition. The unreported order of the United States Court of Appeals for the Ninth Circuit vacating the above order of the District Court on May 23, 1972, is Appendix A to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether one who has been sentenced by a state court to pay a fine is "a prisoner" "in custody" under 28 U.S.C. section 2241, and thus within federal habeas corpus jurisdiction.

2. Whether this case is ripe for review by this Court in light of the Court of Appeals' order remanding the matter to the District Court for initial consideration of the jurisdictional question.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, section 9:

"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Title 28, United States Code, section 2241:

"(c) The writ of habeas corpus shall not extend to a prisoner unless –

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

STATEMENT OF THE CASE

On May 26, 1967, a jury in the Municipal Court of San Francisco found petitioner guilty of distributing obscenity in violation of California Penal Code section 311.2. On June 23, 1967, petitioner was fined $50.00 and placed on six months' probation. Execution of sentence was stayed and petitioner was released on bail pending appeal. The Appellate Department of the Superior Court for the City and County of San Francisco affirmed the conviction on March 6, 1970. The Appellate Department denied a

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rehearing and refused to certify the case to the California Court of Appeal on March 27, 1970.

The Municipal Court further stayed execution of sentence while Cohen petitioned the California Court of Appeal for a writ of habeas corpus, denied on August 2, 1970. Thereafter, the Municipal Court advised Cohen that sentence would be executed on September 10, 1970. On that date the United States District Court stayed execution of the judgment and sentence against petitioner.

On April 2, 1971, the District Court granted a writ of habeas corpus without considering whether, under the statute, it had jurisdiction to entertain the application. The People appealed, and, on May 23, 1972, the Court of Appeals vacated the judgment of the District Court and remanded the cause for initial consideration of the question of jurisdiction. [1]

ARGUMENT

I

ONE SENTENCED TO PAY A $50 FINE IS NOT "A PRISONER" "IN CUSTODY" WITHIN THE MEANING OF 28 U.S.C. Sec. 2241.

Title 28, United States Code section 2241 declares:

"(c) The writ of habeas corpus shall not extend to a prisoner unless--

* * *

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . . ."

"Certainly the writ's great purpose is to test the lawfulness of restrictions upon personal freedom, and both the jurisdictional statute (28 U.S.C. Sec. 2241) and the history of habeas corpus require that the petitioner be 'in

[1] These facts are disclosed by the District Court's order granting a writ of habeas corpus. Petition, Appendix B.

custody' when the application is filed." *Glazier* v. *Hackel*, 440 F. 2d 592, 594 (9th Cir. 1971). *Accord, Johnson* v. *Avery*, 393 U.S. 483, 485 (1969); *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968); Note, 26 Md. L. Rev. 79, 80 (1966).

The term "custody" is synonymous with restraint of liberty. *United States ex rel. Wirtz* v. *Sheehan*, 319 F.Supp. 146, 147 (E.D. Wis. 1970); Sokol, Federal Habeas Corpus, p. 66 (2d ed. 1969). "To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to the common-law usages and the history of habeas corpus both in England and in this country." *Jones* v. *Cunningham*, 371 U.S. 236, 238 (1963).

Petitioner asserts that the Ninth Circuit's order in his case "places it in opposition to every Court of Appeals that has recently considered the problem of the availability of the writ . . . ." Petition, 8. In truth, no other federal court has ever held that one required to pay a fine is "a prisoner" or "in custody." Nor can such precedent be found in the history of the writ in this country or in England.

Petitioner's misleading contention that the instant order creates a conflict between federal appellate courts is based upon the discredited tactic of guilt by assocciation. He attacks other Ninth Circuit decisions, *Hensley* v. *Muncipal Court*, 453 F.2d 1252 (9th 1972), and *Choung* v. *Misterly*, 456 F.2d 176 (9th 1972), and cites conflicting authorities. Neither *Hensley* nor *Choung* involved imposition of fines.

Petitioner seeks nothing less than judicial repeal of a congressionally imposed limitation on federal habeas jurisdiction. The term "custody" cannot be interpreted to include fines unless congressional intent, the history of the writ, and the ordinary meaning of the word are ignored. If "custody" includes fines, it comprehends everything and means nothing.

This Court has always recognized, however, that Congress has full authority to regulate the scope and procedure of the writ. Article I, section 9 of the Constitution, the Suspension Clause, is cast in negative terms. Federal courts are empowered to grant the writ only by implication of the Constitution. Therefore, as Chief Justice Marshall acknowledged,

> "[T]he power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte Bollman*, 4 Cranch 75, 94 (U.S. 1807).

This Court has faithfully adhered to this view. *Ex parte McCardle*, 7 Wall. 506 (U.S. 1868); *Whitney v. Dick*, 202 U.S. 132 (1906); *Adams v. United States ex rel. McGann*, 317 U.S. 269, 273 (1942); *Darr v. Burford*, 339 U.S. 200, 210-214 (1950), *overruled on other grounds, Fay v. Noia*, 372 U.S. 391, 435-436 (1963); *Brown v. Allen*, 344 U.S. 443, 448, 500 (1953). Development of the writ from a limited jurisdictional concept to a broad constitutional remedy at every stage has occurred within the limits and intendments of the existing statute. *Brown v. Allen*, *supra* at 500; *Fay v. Noia*, *supra* at 409-410; *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968).

Petitioner invokes *Carafas* to no avail. Petition, 11 n. 3. This Court held there that "once federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of proceedings on such application." 391 U.S. at 238. The Court so held because of collateral legal consequences flowing from a felony conviction, none of which burden petitioner following his misdemeanor conviction, and to avoid transforming the Great Writ, in many cases, into an illusion.

Ironically, the single decision accepting Cohen's statutory construction was rendered by the Ninth Circuit. Alvin

Settler, convicted and tried by the Yakima Tribal Court for violating tribal fishing regulations, applied for federal habeas corpus. The Ninth Circuit held the writ available notwithstanding the statutory requirement of custody. At the time, there existed no other mode of federal review of tribal court actions. *Settler v. Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969). "[I]f habeas corpus is not available," the court added, "the Yakima Indian Nation can conceivably avoid the imposition of any due process safeguards merely by rendering fines rather than prison sentences." *Id.* at 490. Congress, however, has rested the availability of the writ on the distinction between a fine, or economic sanction, and a restraint of liberty. The Indian Civil Rights Bill, 25 U.S.C. section 1303, provides: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." If, as this Court has repeatedly said, Congress has the power to regulate the scope of the writ, *Settler* is indefensible.

Habeas corpus jurisdiction imposes a great burden upon federal courts, tolerable mainly because personal liberty is at stake. Abandoning the "custody" requirement would greatly increase that burden and could entail federal review over municipal traffic courts. Neither the framers of the Constitution nor the Reconstruction Congress which first enacted the "custody" requirement contemplated such an expenditure of federal judicial energies. If the right to jury trial and, perhaps, the right to counsel may depend upon the severity of the penalty imposed for a state criminal conviction, *Baldwin v. New York*, 399 U.S. 66, 69 (1970); *Argersinger v. Hamlin*, 407 U.S. 25 (1972), so may the availability of federal habeas corpus. Contrary to petitioner's suggestion, Petition, 7, because of this Court's certiorari jurisdiction state courts, unlike tribal courts, cannot insulate

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themselves from federal review by imposing fines rather than detention.

The Ninth Circuit's order here does not conflict with the decision of any other federal court. To the extent that the order implies that a fine is not a restraint on liberty, it is correct.

II

THIS CASE IS NOT RIPE FOR REVIEW.

The Court of Appeals did not reverse the District Court's order granting the writ, but vacated that order and remanded the cause for initial consideration of the jurisdictional question in light of *Choung v. Misterly, supra, Matysek v. United States*, 339 F.2d 389 (9th Cir. 1964), "and other relevant authority." Presumably, the District Court may find *Settler v. Yakima Tribal Court, supra*, not cited in the remand order, relevant authority on an issue which it has never considered. Apposite here is the Court's comment in *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967):

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."

Petitioner argues that the "custody" requirement is satisfied by his fine alone. The District Court's order, however, shows that Cohen was also placed on six months' probation. The conditions of his probation do not appear from the record. The District Court's order further reflects that execution of sentence was twice stayed by the sentencing court and subsequently by the District Court.

Petition, Appendix B, ii-iii. Whether, at the time Cohen filed his habeas corpus petition, his probation had expired or had been stayed by the sentencing court is unclear upon this record. The Court of Appeals may have assumed that probation no longer was a factor in determining jurisdiction. However, the vitality and terms of the probation order are proper subjects for inquiry by the District Court upon remand.

CONCLUSION

For the stated reasons, the People of the State of California respectfully urge this Court to deny the petition for a writ of certiorari.

Dated: November 23, 1972.

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CERTIFICATE OF SERVICE BY MAIL

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CLIFFORD K. THOMPSON, JR., a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on November 23, 1972, he served a true copy of the attached Response in Opposition to Petition for Writ of Certiorari in the above-entitled matter on counsel for petitioner by placing same in an envelope addressed as follows:

Paul N. Halvonik, Esq.
Friedman, Sloan & halvonik
680 Beach Street, Suite 436
San Francisco, California 94109

Said envelope was then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

CLIFFORD K. THOMPSON, JR.